

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 8, 2007 Session

**IN RE: T.B.H.**

**Appeal from the Circuit Court for White County**  
**No. 1399     John J. Maddux, Jr., Judge**

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**No. M2006-01232-COA-R3-JV - Filed on April 20, 2007**

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Father filed petition to change custody four months after juvenile court awarded “full” custody of minor child to grandparents after finding the child dependent and neglected. No appeal was perfected from this order finding the child dependent and neglected. After juvenile court construed its order as having awarded grandparents permanent custody, Father dismissed his petition for change of custody and filed a Rule 60 motion to set aside the original dependency, neglect and custody order. The juvenile court denied the motion and Father appealed to this Court. We remanded the case to circuit court, which affirmed the order of the juvenile court and denied the Rule 60 motion. Father appeals. The decision of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Samuel J. Harris, and Martelia T. Crawford, Cookeville, Tennessee, for the appellant, Vince Harriman.

Henry D. Fincher, Cookeville, Tennessee, for the appellees, Cynthia Ogeltree and Wayne Ogeltree.

**OPINION**

On February 21, 2002, Cynthia and Wayne Ogeltree filed a petition alleging that the three children of their daughter, Mrs. Michelle Harriman, were dependent and neglected and requesting that permanent custody of their grandchildren, D.B.B., S.S.B., and T.B.H., be awarded to them. On February 21, 2002, the juvenile court determined that the current custody situation presented an immediate threat of harm to the children and therefore awarded temporary custody of the children to the Olgetrees. On September 16, 2002, Mrs. Harriman and Mr. Steve Brown, father of S.S.B., relinquished all custodial rights to the children. Thus, only the custodial rights of Mr. Vince Harriman, father of T.B.H., remain at issue.

At the hearing on October 8, 2002, the juvenile court ruled that T.B.H. was dependent and neglected. The court then set forth conditions for Mr. Harriman to satisfy in order to show a material change in circumstances and warrant a change in custody. However according to Mr. Harriman, the November 22, 2002, order awarding the Ogletrees “full” legal and physical custody of T.B.H. deviated from the court’s oral ruling which merely continued temporary custody of T.B.H. with the Ogletrees.

On March 26, 2003, Mr. Harriman filed a petition to change custody, alleging that he had completed the list of requirements created by the court’s October 8, 2002, oral ruling, such that he was entitled to a finding of a material change in circumstances. The Ogletrees argued however, that the goals enunciated by the court were not intended to be a set of circumstances that if met, would automatically constitute a material change in circumstances. Instead, since the November 22, 2002, order granted them permanent custody of T.B.H., Mr. Harriman had the burden of proving a material change in circumstances pursuant to the holding in *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn.2002)<sup>1</sup>.

At the hearing on November 23, 2003, the juvenile court interpreted its order as having awarded the Ogletrees permanent custody and thus the burden of proof established in the *Blair* case applied. As a result, Mr. Harriman did not enter any proof at the hearing. On January 16, 2004, an order was entered dismissing Mr. Harriman’s petition for change of custody and instead, adjusting the amount of visitation and support to reflect the parties’ agreement.

On January 20, 2004, Mr. Harriman filed a Rule 60 motion asking the court to set aside the November 22, 2002, order, alleging that the order of the juvenile court was void for lack of subject matter jurisdiction. The juvenile court denied the motion on April 20, 2004, and Mr. Harriman appealed to the Court of Appeals. On January 11, 2005, this Court transferred the case to circuit court pursuant to Tennessee Code Annotated section 16-4-108(a)(2). On April 10, 2006, the circuit court denied Mr. Harriman’s Rule 60 motion, finding that the juvenile court had subject matter jurisdiction to make a final custody decision regarding a dependent and neglected child. Mr. Harriman appeals.

The sole issue on appeal is whether the court erred in denying Mr. Harriman’s Rule 60 motion to set aside the November 22, 2002, order granting “full” custody of T.B.H. to the Ogletrees. Rule 60.02 states in relevant part:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud

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<sup>1</sup> In *Blair*, the Tennessee Supreme Court determined that “a natural parent seeking to modify a custody order that grants custody to a non-parent must show that a material change in circumstances has occurred, which makes a change in custody in the child’s best interests.” 77 S.W.3d at 138.

(whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken....

Rule 60.02 provides “an exceptional remedy,” *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294 (Tenn.1992), “designed to strike a proper balance between the competing principles of finality and justice.” *Jenkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn.1976). “Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules.” *Thompson v. Firemen’s Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn.1990). However, “[b]ecause of the importance of this ‘principle of finality,’ the ‘escape valve’ should not be easily opened.” *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn.1991).

The disposition of a Rule 60 motion is left to the discretion of the trial court and may be only be reversed upon a showing of an abuse of discretion. *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn.1993). In order to set aside a judgment under Rule 60.02, the movant bears the burden of proving that he is entitled to relief. *Brumlow v. Brumlow*, 729 S.W.2d 103, 106 (Tenn.Ct.App.1986). In an effort to circumvent the burden of proof announced in *Blair*, Mr. Harriman contends that the juvenile court’s November 22, 2002, order should be set aside pursuant to Rule 60.02 because the juvenile court lacked subject matter jurisdiction.

“[T]he concept of subject matter jurisdiction implicates a court’s authority to hear and decide a particular type of case.” *SunTrust Bank, Nashville v. Johnson*, 46 S.W.3d 216 (Tenn.Ct.App.2000). The juvenile court has statutorily authorized continuing and exclusive subject matter jurisdiction over allegations of dependency and neglect of a minor child pursuant to Tennessee Code Annotated section 37-1-103, which states in pertinent part:

(a) The juvenile court has exclusive original jurisdiction of the following proceedings, which are governed by this part:

(1) Proceedings in which a child is alleged to be delinquent, unruly or dependent and neglected, or to have committed a juvenile traffic offense as defined in § 37-1-146;

...

(c) When jurisdiction has been acquired under the provisions of this part, such jurisdiction shall continue until the case has been dismissed, or until the custody determination is transferred to another juvenile, circuit, chancery or general sessions court exercising domestic relations jurisdiction, or until a petition for adoption is filed regarding the child in question as set out in § 36-1-116(f)... Notwithstanding any

other law to the contrary, transfers under this provision shall be at the sole discretion of the juvenile court and in accordance with § 37-1-112. In all other cases, jurisdiction shall continue until a person reaches the age of eighteen (18), except that the court may extend jurisdiction for the limited purposes set out in § 37-1-102(b)(4)(B) until the person reaches the age of nineteen (19).

While it is true that a juvenile court is one of limited and special jurisdiction; within its jurisdiction, its powers are full. *Cartwright v. Juvenile Ct. at Nashville*, 113 S.W.2d 754, 756 (Tenn.1938). These powers include the ability to order that custody of a dependent and neglected child “remain with the child’s parents, guardian, or other custodian.” Tenn.Code Ann. § 37-1-130(a)(1).

Mr. Harriman argues however that the juvenile court exceeded its jurisdictional power by awarding the Ogletrees “full” custody of T.B.H. since pursuant to Tennessee Code Annotated sections 37-1-130(a)(1) and 37-1-102(b)(7), the juvenile court is only vested with the authority to award temporary custody to a custodian. Tennessee Code Annotated section 37-1-130(a)(1) states:

(a) If the child is found to be dependent or neglected, the court may make any of the following orders of disposition best suited to the protection and physical, mental and moral welfare of the child:

(1) Subject to the restrictions of § 37-1-129(e), permit the child to remain with the child's parents, guardian or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

Tennessee Code Annotated section 37-1-102(b)(7) defines “custodian” as “a person; other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom *temporary* legal custody of the child has been given by order of a court.” (Emphasis added).

“In the real sense of the word, all custody orders are temporary, since they remain in the control of the court for future modification as circumstances demand.” *Black v. Black*, 1988 WL 22823, \*4 (Tenn.Ct.App. Mar. 10, 1988). Although the language “full legal and physical custody” was not ideal, it effectively marked the final disposition of the matter such that an attempt to modify the custody arrangement would require Mr. Harriman to show a material change in circumstances. Despite the parties’ arguments to the contrary, it makes no difference in this case whether the order granted the Ogletrees permanent or temporary custody but rather that the order was an order of final disposition such that Mr. Harriman had a right to appeal to the Circuit Court pursuant to Tennessee Code Annotated section 37-1-159(a). No appeal was perfected. It is after an order of final disposition that a natural parent may lose the right to invoke the doctrine of superior parental rights in a petition to change custody. Clearly, the juvenile court has the authority to direct the proper placement of a dependent and neglected child in a final disposition proceeding, whether it be with a natural parent, guardian, or other custodian. We therefore find no merit in Mr. Harriman’s argument that the juvenile court exceeded its jurisdiction by awarding “full” custody to the Ogletrees.

We likewise find no merit in Mr. Harriman's argument that the juvenile court's failure to prescribe the safeguards required in cases involving the Department of Children's Services divested the juvenile court of subject matter jurisdiction. According to Tennessee Code Annotated section 37-1-166, prior to terminating parental rights in a case involving the Department of Children Services, the juvenile court must determine that reasonable efforts have been made towards reunification:

(a) At any proceeding of a juvenile court, prior to ordering a child committed to or retained within the custody of the department of children's services, the court shall first determine whether reasonable efforts have been made to:

(1) Prevent the need for removal of the child from such child's family;

or

(2) Make it possible for the child to return home.

(b) Whenever a juvenile court is making the determination required by subsection (a), the department has the burden of demonstrating that reasonable efforts have been made to prevent the need for removal of the child or to make it possible for the child to return home.

The court has determined that in order to meet the "reasonable efforts" burden, the State must create a permanency plan, by which a parent can obtain reunification with the child if certain requirements are successfully met. *In re Giorgianna H.*, 205 S.W.3d 508, 519 (Tenn.Ct.App.2006). However contrary to Appellant's assertion, there are no such requirements in private custody cases where the State is not involved. In fact, the Tennessee Supreme Court rejected the primacy of the goal of reunification in custody cases where the State was not involved in the *Blair* case. Said the Court:

Based on our prior case law interpreting Article I, section 8 in this context, and given the overwhelming authority from other jurisdictions on this issue, we conclude that our Constitution does not accord natural parents a presumption of superior rights to modify an existing and valid order of custody, even when that order results from the parent voluntarily agreeing to give custody to the non-parent. Though strong in many respects, no aspect of the fundamental right of parental privacy is absolute, and a parent who is given the opportunity to rely upon the presumption of superior rights in an initial custody determination may not again invoke that doctrine to modify a valid custody order. Absent proof of the custody order's invalidity or proof that the parental rights were not protected in the initial custody proceeding, the child's interest in a stable and secure environment is *at least* as important, and probably more so, than the parent's interest in having custody of the child returned.

77 S.W.3d at 148.

On November 22, 2002, the Juvenile Court of White County, Tennessee, entered an order finding T.B.H. to be a dependent and neglected child. In this order, custody was granted to the maternal grandparents, Cynthia and Wayne Ogletree. No appeal was perfected by any party from this order, and it became final. On January 26, 2003, Mr. Harriman filed a Petition to Change Custody,

and at a hearing thereon held November 25, 2003, Mr. Harriman failed to offer proof when the Juvenile court indicated that it would apply *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn.2002) under which standard Mr. Harriman would have to demonstrate a change of circumstances. The juvenile court, thereafter, on January 16, 2004, dismissed the Petition of Mr. Harriman.

On January 20, 2004, Mr. Harriman filed a Tennessee Rule of Civil Procedure 60 Motion asking the juvenile court to set aside its November 22, 2002 order on the basis that the order was void. This Rule 60 Motion was denied by the juvenile court on April 20, 2004, and Mr. Harriman appealed to this Court. On January 11, 2005, this Court determined that since the appeal involved a dependency and neglect proceeding in the juvenile court, it should have been appealed to the Circuit Court pursuant to Tennessee Code Annotated section 37-1-159(a). This Court thereupon transferred the appeal to the Circuit Court for White County under Tennessee Code Annotated section 16-4-101(a)(2). On April 10, 2006, the White County Circuit Court heard Mr. Harriman's Rule 60 Motion *de novo*, and on May 10, 2006, the Circuit Court denied the Rule 60 Motion holding that the White County juvenile court had subject matter jurisdiction and that its order of November 22, 2002 was not void.

Having found that the juvenile court had continuing and exclusive jurisdiction to determine the proper custodial arrangement for T.B.H. and that the juvenile court did not exceed its authority by awarding the Ogletrees "full" custody of T.B.H., we affirm the trial court's decision denying Mr. Harriman's Rule 60 motion. The costs of appeal are assessed against Appellant, Mr. Harriman.

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WILLIAM B. CAIN, JUDGE